Supreme Court, U.S.
FILED

971410 FEB 23 1998

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBBIE GUARGANA (WILLIAMS); JOHN HOPKINS; RUTH HOPKINS; husband and wife, and the marital community composed thereof,
Plaintiffs

MERLIN E. CARLSON, JR.
Plaintiff-Petitioner

v.

GENERAL ELECTRIC COMPANY, a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Respondents

On Petition for Writ Of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Marcia M. Meade
Attorney for Petitioner/Counsel of Record
DAWSON & MEADE
1300 W. Dean
Spokane, Washington 99201-2015
(509) 328-4266

---

35 PP

QUESTION PRESENTED FOR REVIEW

In diversity in a post-verdict setting does *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) in as much as Fed.R.Evid.Rule 702 may apply, determine the sufficiency of causation evidence or does *Gasperini v.Center for Humanities, Inc.*, 518 U.S ___, 116 S.Ct. 2211, 135 L.Ed2d 659 (1996) require that the trial court under the *Erie* Doctrine apply state substantive law on the sufficiency of proof on causation?

In a diversity in a Rule 50(b) setting does the district court exceed its authority by applying *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) admissibility standards in testing sufficiency of causation proof in a state based claim?

In a negligence in a Rule 50(b) setting does a trial court exceed its authority when it applies federal procedural law to wit *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) instead of controlling state substantive law in testing the sufficiency of the causation proof?

In a diversity when there is an unchallenged and consistent Rule 49(a) special verdict does the trial court exceed its authority if the court resurrects "legally" non-essential previously waived issues to support a new trial ruling for determination of those issues that all parties and the court had previously waived by operation of Rule 49(a)?

When the basis of appeal is that the trial court lacked jurisdiction to set aside a 134 day old judgment, and there is bonafide proof that the trial court has *sua sponte* moved and granted, its own motion for a new trial by improperly using and applying Rules 49(a), 50(b) and 59(d), is it a denial of due process and the right to a jury trial for a court of appeals to avoid accepting jurisdiction?

LIST OF PARTIES

Petitioner is Merlin E. Carlson, Jr. (a Plaintiff in the District Court and an Appellant in the Court of Appeals). David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, Kathrene Froese, Deborah Williams, John Hopkins and Ruth Hopkins were Co-Plaintiffs in the District Court and Co-Appellants in the Court of Appeals.

Respondents are General Electric Company and Kaiser Aluminum and Chemical Corporation, who were Defendants in District Court and Appellees in the Court of Appeals.

LIST PURSUANT TO RULE 29.6

According to the prior corporate disclosure statement General Electric Company is a publicly held corporation with no parent companies. Its subsidiaries and affiliates are General Electric Capital Corporation; General Electric Credit International, N.V.; Montgomery Ward and Company, Inc.; General Electric Capital Preferred Asset Corporation; CAMCO, Inc. (Canada); General Electric Capital Services, Inc.; GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; GNA Corporation; Mercur Bank (Austria); Imaging Financial Services, Inc.; and Dart V. Kraft, Leasing Corporation.

Kaiser Aluminum and Chemical Corporation is a wholly owned subsidiary of Kaiser Aluminum Corporation. Kaiser Aluminum Corporation has equities securities which are publicly held. Kaiser Aluminum Corporation's parent, Maxxam, Inc., has debt and equity securities which are publicly held. Maxxam, Inc.'s affiliates with either publicly held equity or debt securities are Maxxam Group, Inc.; the Pacific Lumber Company; Scotia Pacific Holding Company; and Sam Huston Race Park, Ltd.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF AUTHORITIES viii
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
RULES INVOLVED 3
STATEMENT OF THE CASE 3
A. Background Facts 3
B. Procedural Background 5
ARGUMENT FOR GRANTING THE WRIT 7
I There Is A Paramount Need To Reconcile Admissibility Of Expert Testimony With Test For Sufficiency Of Proof For State-Created Claims 7
II Rules 49(a), 50 And 59 Are Being Improperly Defined By Conflicting Applications Of *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). The Conflict Results In An Altered Outcome In Derogation Of The *Erie* Doctrine 10
III Predictability Of The Factors Influencing The Admission Of Expert Opinions And The Later Test For Sufficiency Of Proof Facilitate The Purpose Of Rule 1 12
IV If Rules 49(a) and 50 Are To Be Used Together There Are, And If Not, There Should Be Certain Ground Rules Enforced To Promote Just, Speedy, And Inexpensive Resolutions Of Disputes 13
V When There Is Bonafide Record That The District Court Exceeded Its Authority It Is Unacceptable For The Appellate Court To Avoid Or Abdicate Addressing The Jurisdictional Challenge 16

VI Failing To Accept A Jurisdictional Challenge The Court of Appeals Sanctioned The Unacceptable And Extremely Usual Proceedings Under The Law And The Civil Rules Of Procedure.....18

VII The Ninth Circuit's Endorsement Of The Trial Court's Rulings Improperly Abrogates Rule 49(a).....20

CONCLUSION.....22

APPENDICES

APPENDIX A

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., 120 F.3d 991 (9th Cir. 1997) (Opinion).....1a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash., Nov. 25, 1994) (Order Re: Post-Trial Motions).....16a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash., Nov. 25, 1994) (Order Re: Motions to Amend and Certify).....45a

APPENDIX B

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092 and 95-35145 (9th Cir. Mar. 24, 1995) (Order On Jurisdiction).....50a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092 and 95-35145 (9th Cir. Nov. 24, 1997) (Order Denying Rehearing) 52a

APPENDIX C

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. July 13, 1994) (Judgment in a Civil Case) 54a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. July 13, 1994) (Special Verdict Carlson) 58a

APPENDIX D

U.S. Constitution Seventh Amendment 62a
U.S. Constitution Fifth Amendment 62a
U.S. Constitution Article III 62a
Fed.R.Civ.P. 8(a) 64a
Fed.R.Civ.P. 49(a) 64a
Fed.R.Civ.P. 50(a) (b) 1963 version 65a
Fed.R.Civ.P. 50(a)(b) 1991 version 66a
Fed.R.Civ.P. 50(a)(b) 1995 version 67a
Fed.R.Civ.P. 59(d) 1966 version 68a
Fed.R.Civ.P. 59(d) 1995 version 69a
28 U.S.C. § 2072 ..... 69a
Wash. Const. Art. 1 § 21 ..... 70a
Rev. Code Wash. 5.40.050 ..... 70a

APPENDIX E

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Plaintiffs' Lists Of Claims, Theories Of Liability, And Identity Of Experts Who Will Be Called) 71a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, June 27, 1994) (Plaintiffs' Memorandum On Potential Instructional Error By Attempting To Define Area Of Injury) 88a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (Court's Instructions to the Jury [Jury Instructions on Damages, Nos. 28, 29, 31, 32, 33, and 34]) 93a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For Judgment As A Matter Of Law) 99a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For New Trial Or Alternative Relief) 101a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, December 9, 1994) (Motion That The Order Of November 25, 1994, Is A Final Decision And There Is No Just Reason For Delay) 103a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D.Wash, December 29, 1994) (Plaintiffs' Reply To Defendants' Opposition To Fed.R.Civ.P. 54(B) Language) 106a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, December 28, 1994) (Affidavit Of Marcia M. Meade In Response To Defendants' Opposition To The Fed. R. Civ. P. 54(B) Language [w/ attachments]) 113a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 31, 1995) (Brief In Support Of Motion To Dismiss) 125a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., Nos. 95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Motion To Remand For Lack Of District Court Jurisdiction And Stay Of Schedule (Fed.R.App.P. 9th Cir. 27.11)) 133a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Memorandum In Support Of Remand, Reinstatement Of Verdict, And Stay Of Proceedings Under Cir. R. 27-11.).....137a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., March 7, 1995) (Appellants' Schudel, Glass, Schudel, Schudel, Howell (Froese), Thompson, Hopkins And Hopkins Motion For Remand And For Stay Of Schedule Pursuant To Circuit Rule 27.11) 151a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 3, 1995) (Appellant Carlson's Reply To Appellee's Memorandum In Opposition Of Remand) 158a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 15, 1995) (Appellants-Plaintiffs' And Appellee Guaragna's Memorandum In Opposition To Motion To Dismiss) 166a

OTHER AUTHORITIES

Organic Solvent Encephalopathy: An Old Hazard Revisited. Am. J. Ind. Med., Vol. 22, 109-115 (1992) 183a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. January 18, 1994) (Offer Of Proof Of Daniel Goldstein)..... 198a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Declaration Of Samuel Milham, Jr. On Offer Of Proof) 205a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Offer Of Proof By Plaintiffs Re: The Testimony Of Paula A. Lantsberger, M.D.) 219a

TABLE OF AUTHORITIES

Page

CASES

A&G Stevedores v. Ellerman Lines,
369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962)..... 21

Ambroosini v. Labarraque,
101 F.3d 129 (D.C. Cir. 1996)..... 7

Bennett v. Dept. of L&I,
95 Wn.2d 531, 627 P.2d 104 (1981) 20

Bitzan v. Parisi,
88 Wn.2d 116, 558 P.2d 775 (1981) 15, 19

Browder v. Dept. of Corrections,
434 U.S. 257, 264 (1978) 20

Claar v. Burlington N. R.R.,
29 F.3d 499, 504 (9th Cir.1994) 8

Daubert v. Merrell Dow,
113 S.Ct. 2786, 509 U.S. 579,
125 L.Ed.2d 469 (1993)..... *passim*

Daubert v. Merrell Dow,
43 F.3d 1311 (9th Cir. 1995) 8

Eastman Kodak Co. v. Southern Photo Materials Co.,
273 U.S. 359, 71 L.#d. 684, 47 S.Ct. 400 (1927)..... 19

Eaton v. Nat'l Steel Production Co.,
624 F.2d 863 (9th Cir. 1980) 7, 19
Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 10
Ferebee v. Chevron Chem. Co.,
736 F.2d 1529 (D.C. Cir.), *cert. denied*,
469 U.S. 1062 (1984) 8
Floyd v. Laws,
929 F.2d 1390 (9th Cir.1991) 18
Freeman v. Hittle,
747 F.2d 1299 (9th Cir. 1984) 7
Gallick v. Baltimore & Ohio R. Co.,
372 U.S. 108, 83 S.Ct. 659,
9 L.Ed.2d 619 (1963) 18, 21
Gasperini v.Center for Humanities, Inc.,
518 U.S ___, 116 S.Ct. 2211 (1996) 11, 21
Guaranty Trust Co. v. York,
326 U.S. 99, 109 (1945) 11
Hopkins v. Dow Corning Corp.,
33 F.3d 116 (9th Cir.1994) 7
Intalco Aluminum v. L&I,
66 Wn.App. 664, 833 P.2d 390 (1992) 8, 12, 13, 19
Joiner v. General Elec. Co.,
___ U.S. ___, 118 S.Ct. 512 (1997) 13, 14
Kern v. Levelor Lorentzen, Inc.,
899 F.2d 772, 775, (9th Cir. 1990) 19
Lavender v. Kurn,
327 US 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) 20
McCord v. McGuire,
873 F.2d 1271, *amended*, 885 F.2d 650
(9th Cir. 1989) 8, 20
McLaughlin v. Cooke,
112 Wn.2d 829, 774 P.2d 1171 (1989) 12, 15, 19, 20

Peterman v. Chicago, Rock Island & Pacific RR Co.,
493 F.2d 88 (8th Cir.), *cert. denied*,
417 U.S. 947 (1974) 7, 17
Phillips v. Negley,
117 U.S. 665 (1886) 7
Reese v. Strohl,
907 P.2d 282 (1996) 16
Schudel v. General Elec. Co.,
120 F.3d 991 (9th Cir. 1997) ..... *passim*
Simms v. Village of Albion NY,
115 F.3d 1098 (1997) 20
Sofie v. Fiberboard Corp.,
112 Wn.2d 636, 711 P.2d 260,
780 P.2d 260 (1989) 19, 22
Stradley v. Cortez,
518 F.2d 488 (3rd Cir. 1975) 8
Walker v. Armco Steel Corp.,
446 U.S. 738, 751 (1980) 21
Wheeler v. Catholic Archdiocese,
124 Wn.2d 634, 880 P.2d 29 (1994) 22

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
28 U.S.C. § 1332(a)(i) 1
28 U.S.C. § 2072 ..... 3, 16, 21
29 U.S.C. § 1332(a)(1) 1

RULES & REGULATIONS

Federal Rules of Civil Procedure, Rule 8(a) 3, 19
Federal Rules of Civil Procedure, Rule 49(a) ..... *passim*
Federal Rules of Civil Procedure, Rule 50
1963 version ..... Appendix
Federal Rules of Civil Procedure, Rule 50(a)
1963 version ..... Appendix

Federal Rules of Civil Procedure, Rule 50(b)
1963 version ..... Appendix
Federal Rules of Civil Procedure, Rule 50
1991 version ..... *passim*
Federal Rules of Civil Procedure, Rule 50(a)
1991 version ..... Appendix
Federal Rules of Civil Procedure, Rule 50(b)
1991 version ..... *passim*
Federal Rules of Civil Procedure, Rule 54(b) 2
Federal Rules of Civil Procedure, Rule 59 ..... *passim*
Federal Rules of Civil Procedure, Rule 59(d) ..... *passim*
U.S. Constitution, Fifth Amendment 1
U.S. Constitution, Seventh Amendment 21

OTHER AUTHORITIES

Organic Solvent Encephalopathy: An Old Hazard Revisited. Am. J. Ind. Med., Vol. 22:109-115 (1992) 4

Organic Solvent Neurotoxicity: Facts and Research Needs, Scand. J. Work. Environ. Health, 11, supp. 1:35-60 (1985) 8

PETITION FOR WRIT OF CERTIORARI

Merlin E. Carlson, Jr., Plaintiff below and Petitioner herein, respectfully pray that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals, Ninth Circuit, entered on July 23, 1997, and affirmed by Order filed November 24, 1997, denying Carlson's Petition for Rehearing and Suggestion for Rehearing *en banc*.

The Ninth Circuit's rulings below are appropriate for this Court's consideration for several reasons. The Ninth Circuit's decision: (1) conflicts with several decisions of another United States Court of Appeals on the same important federal matter; (2) the decision conflicts with substantive state law on the burden of proof for causation. The important matter involved the above include: (1) whether by the use of *Daubert v. Merrell Dow* 509 U.S. 579 (1993) is purely a case of admissibility and not for sufficiency of evidence, thereby granting a new trial exceeds the trial court's authority; (2) may a court resurrect sub-issues that have been judicially waived by the operation of Rule 49(a); and (3) when considering a Rule 50(b) motion, may the district court resurrect sub-issues that have been waived pursuant to Rule 49(a).

The Ninth Circuit decision also represents a departure from the usual course of judicial proceedings by that it sanctioned a 134 day post-verdict district court's *sua sponte* resurrection. The departure from the usual and acceptable proceedings is of such a manner as to warrant the exercise of this Court's supervisory power. The Ninth Circuit decision also represents a departure from the usual course of judicial proceedings by either avoiding or abdicating an appeal based upon a jurisdictional challenge of a district court to *sua sponte* grant either a Rule 50(b) or Rule 59(d) motion 134 days post verdict.

OPINIONS BELOW

The judgments rendered at the trial court level and rulings by the trial court which give rise to the appeal to the Ninth Circuit

are the Judgment of July 13, 1994 [54-a],[1] (as applied to Petitioner Carlson), pertinent portions of trial court ruling of November 25, 1994 [16-a], and Amended Judgment of November 25, 1994. [45-a]. The opinion of the United States Ninth Circuit Court of Appeals that gives rise to this petition is *Schudel, et al. v. General Electric Co.*, 120 F.3rd 991 (9th Cir. 1997). [1-a]. By order filed November 24, 1997, the Ninth Circuit denied Hopkins petition for rehearing and suggestion for rehearing *en banc*. [52-a]

JURISDICTION

This action was commenced on September 30, 1991, in the Spokane County, Washington Superior Court. It was removed by Defendants General Electric and Kaiser Aluminum (hereinafter collectively referred to as G.E.) to the Federal District Court, Eastern District of Washington, based upon diversity of citizenship under 28 U.S.C. § 1332(a)(1). Following a 54-day jury trial, judgment was entered on July 13, 1994, in favor of Carlson. [54-a]. G.E. filed its motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) (hereinafter "Rule 50") and alternative motion for a new trial under Fed. R. Civ. P. 59 (hereinafter "Rule 59") on July 27, 1994. G.E. did not file a Notice of Appeal challenging the July 13, 1994, judgment.

On November 25, 1994, the trial court, *sua sponte*, without oral argument, granted judgment as a matter of law (hereinafter JMOL) in favor of G.E. on all Carlson's "non-neurological" claims and ordered a new trial on damages for Carlson. On January 15, 1995, the trial court certified the order as to Carlson under Rule 54(b).

Carlson appealed to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1291. The Ninth Circuit issued its opinion on July 23, 1997. *Schudel, et al. v. General Electric, Co.*, 120 F.2d 991 (9th Cir. 1997). Thereafter, on November 24, 1997, the Ninth Circuit denied Carlson's timely filed motion for rehearing and suggestion for rehearing *en banc*.

---

[1] The Appendices for this Writ are separately bound in two volumes.

Pursuant to Supreme Court Rule 13.1 and 13.3, this petition for certiorari has been filed within 90 days of the denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

Due to the lengthy nature of the materials, the full text of the following Constitutional provisions, statutes and court rules are set forth in Appendix D:

U.S. Constitution Fifth Amendment
U.S. Constitution Seventh Amendment
U.S. Constitution Article III
Fed.R.Civ.P. 8(a)
Fed.R.Civ.P. 49(a)
Fed.R.Civ.P. 50(a) (b) 1963 version
Fed.R.Civ.P. 50(a)(b) 1991 version
Fed.R.Civ.P. 50(a)(b) 1995 version
Fed.R.Civ.P. 59(d) 1966 version
Fed.R.Civ.P. 59(d) 1995 version
28 U.S.C. § 2072
Wash. Const. Art. 1 § 21

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background Facts.

Kaiser Aluminum Chemical Corporation worked with General Electric Company to clean-up twenty-five years of Polychlorinated biphenyls (herein "PCBs") contamination at the site known as Trentwood. (Herein both Kaiser Aluminum and General Electric will be collectively referred as "G.E" unless otherwise stated.) G.E. planned and did use known federally and state regulated hazardous chemicals to remove the PCBs.

In October 1988 Merlin E. Carlson, Jr., was working for Qualified Personnel, Inc., (herein "QPI") at Trentwood. Through G.E.'s negligence Carlson was repeatedly exposed to 5 to 10 times the permissible exposure limits of numerous hazardous chemicals.

He was injured by the repeated negligent exposures.

Independent of this litigation Washington's occupational epidemiologist, Dr. Samuel Milhem, Dr. Peter Houck from the Center of Disease Control, and Spokane County Health Department investigated the incident.[2] The investigators examined the work site and determined what and how hazardous chemicals[3] were used. Investigators referred the exposed workers to local physicians for further testing and treatment. After completing the investigation and medically following the exposed persons for years, the investigators published part of their medical findings in a peer-reviewed scientific journal.[4]

Carlson is described in the journal article. After the toxic exposures Carlson is a completely different person. He has persistent problems with impaired memory, confusion, significant depression, profound fatigue, personality change, headaches, coughing and shortness of breath. Medically the problems are so profound he is no longer able to live independently. His family takes care of him daily. He is totally unemployable.

Carlson was 23 years old when poisoned. He is a Native American of the Blackfeet tribe. He was chosen and trained from

---

[2] Originally, the health department was investigating Legionella outbreak in a G.E. supervisor. When multiple workers presented with signs of poisoning the Dr. Milhem was called into investigate the occupational poisoning. [205-18a]

[3] The hazardous chemicals were principle two types — organic solvents and caustic detergents. Among many other chemicals Trichoroethane (TCA); Perchoroehtylene (PERC); Naphthalene; Trimethylbenzenes; 1,2,4-Trimethylbenzene (Xylene); Sodium Hydroxide; Aryl Sulfonate; Phosphate; Silicates; Chelate (EDTA-type); Alkyl aryl polyether; Phosphate ester; Sodium Tripolyphosphate; Surfactant Nonylphenoxpoly; Mono and Diakly Acid Phosphate; Ehylene gycol; Monobutyl ether; Cycohexanal; Monoehanolamine; C9-C12 Paraffins and C9-C12 Cycloparaffins were used. These hazardous chemicals were being mixed with other chemicals such as "409" and "Wiley's" driveway cleaner, then put in 409 spray bottles.

[4] *Organic Solvent Encphalophathy: An Old Hazard Revisited,* Am. J. Ind.Med. Vol. 22 (1992). [183-192-a]

age 11 to be a medicine man for the Blackfeet tribe.[5] Carlson is deeply ashamed that he is no longer able to fulfill his role as a medicine man. This loss for Carlson is a great spiritual loss and greatly diminishes his self esteem and identity.

Multiple expert and lay witnesses testified about G.E.'s negligence. Multiple medical doctors testified that more probably than not Carlson had been permanently injured by his toxic exposure to hazardous chemicals. Former employers, teachers, friends, family and the tribal chief testified as to Carlson's abilities and nature before and after the negligent poisoning. After a three month trial the jury found (1) G.E. negligent; (2) the negligence was a proximate cause of injury to him; (3) Carlson was not a "loaned servant"; and (4) damages were $2,775,768.00.

B. Procedural Background.

On September 30, 1991, Carlson and nine other plaintiffs filed a complaint for negligence in the Spokane Superior Court of the State of Washington. On February 25, 1992, G.E. had the action removed pursuant to 28 U.S.C. § 1446(a).

Pre-trial the district court ordered plaintiffs to list "each claim" against the defendants, including all theories of liability or causation. Carlson complied. [69-a]. Carlson's only "claim" was of negligence. In the same filing Carlson provided extensive disclosure of all his theories of negligence, his causation proof, and names of all expert witnesses and their respective subject area. Pre-trial there were extensive "*Daubert*" hearings on all challenged expert witnesses.[6] Then the court ruled that medical

---

[5] In the Blackfeet culture this is a spiritual position in the community. There is a great deal of responsibility which attaches to the position in the tribe. Mr. Carlson was from a renowned family in the tribe, so it was a great honor and responsibility from him to assume a role as a medicine man.

[6] This trial was to occur shortly after the decision *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). Carlson's expert witnesses filed extensive offers of proofs with multiple attachments supporting their methodology from peer-reviewed published scientific textbooks and journals. For clarity the Offers of Proof for Drs. Goldstein, Lantsberger and Milhem. [198-a, 205-a, 219-a,] are

expert witness on "toxic encephalopathy" could testify.

Before deliberations the parties and the district court had a five day instruction conferences. Both Carlson and G.E. proposed special verdicts. The special verdict addressed each essential elements of a negligence and G.E.'s affirmative defense of "loaned servant." During the jury conference the court requested Carlson to submit a list of his contentions. He did so. [114, 117-118a]. At that time Carlson identified his position that it would be error to instruct on or list in the special verdict to specifically define the injuries. [88-90a], when the damage instructions under state law identified the elements. (Damage Instructions given are at 92-97a.)

The appropriate jury instructions, including instructions on damage were given. The special verdict given was basically what G.E.'s proposed. [58-59-a]. After a two week deliberation, verdicts were returned in favor of all plaintiffs. Before the jury was dismissed neither G.E. nor the district court proposed that the jury be required to make further or additional Rule 49(a) findings.

On July 13, 1994, a judgment for Carlson for $2,775,768.00 was entered. On July 27, 1994, G.E. served on Carlson's attorneys Rule 50(b) and 59(b) motions. G.E. did not move for a new trial based upon a claimed error in the special verdict. In the ten judicial days following entry of the judgment the district court initiated no motion for a new trial for any reason.

On November 25, 1994, 161 days after the verdict, the district court amended Carlson's judgment. The court ruled that there was sufficient evidence to support the jury findings of negligence, loaned servant and injury. The court then *sua sponte* ordered a new trial for a second jury to answer sub-issues of what damages were due to neurological and non-neurological conditions. The order was the first notice on the court's *sua sponte* motion for a new trial.

On December 9, 1994, Carlson moved for Fed.R.Civ.P.

---

reproduced, and for brevity voluminous exhibits in original are not included

54(b) findings on the November 25, 1994, Order. Carlson submitted a lack of "jurisdiction," asserting that the trial court lacked jurisdiction to grant a new trial and citing to multiple authorities.[7] On December 21, 1994, Carlson filed a Notice of Appeal. On January 17, 1995, the district court certified the November 25 Order under Fed.R.Civ.P. 54(b), based on the jurisdictional challenge. On January 24, 1995, Carlson filed an Amended Notice of Appeal.

In the Court of Appeals Plaintiffs and G.E. moved under Fed.R.App.P. 27.11 for remand for lack of jurisdiction. On March 24, 1995, the Court of Appeals denied all motions. In denying G.E.'s motion to remand, the court cited the Fed.R.Civ.P. 54(b) certification and *Freeman v. Hittle*, 747 F.2d 1299 (9th Cir. 1984). On July 23, 1997, the Court of Appeals issued its opinion, ruling that the new trial order was interlocutory and not immediately appealable. [50-51a]. On August 6, 1997, Carlson petitioned for rehearing. On November 24, 1997, the Court of Appeals entered an order denying the petition. [52-53a].

ARGUMENT FOR GRANTING THE WRIT

I. There Is A Paramount Need To Reconcile Admissibility Of Expert Testimony With Test For Sufficiency Of Proof For State-Created Claims.

This petition, as does probably any modern civil case involving chemicals, has the undercurrent of this Court's decision in *Daubert v. Merrell Dow*,509 U.S. 579 (1993). Carlson's record from pre-trial through a Ninth Circuit appeal illustrates that there is a profound interrelation between *Daubert*, the rules of civil procedure and the *Erie* Doctrine. This interrelationship has profound impacts in diversity actions as well as the general orderly administration of litigation.

---

[7] *Phillips v. Negley*, 117 U.S. 665 (1886); *Eaton v. National Steele Products*, 624 F.2d 863 (1980); *McCord v. Maguire*, 873 F.2d 1271(9th Cir. 1989); *Stradley v. Cortez*, 518 F.2d 448 (Cir. 1975); *Peterman v. Chicago, Rock Island & Pacific RR Co.*, 493 F.2d 88(8th Cir), cert. denied, 417 U.S. 947 (1974)

In one respect, perhaps this petition is slightly different. Carlson's pre-trial was shortly after the *Daubert* decision. The pre-trial and three month trial is essentially a cavalcade of almost every facet of *Daubert* from the last five years. The trial can be viewed as a three month *Daubert* hearing with a jury verdict at the end.[8] Over the last four years Carlson has been subjected to the emergence of two divergent case lines. His case history outlines the development of the conflict between the two *Daubert* lines.

Pre-trial Carlson's, G.E.'s and the district court's only guidance for addressing G.E.'s *Daubert* challenge to expert opinions was *Daubert*. Carlson modeled his proffers[9] on the law of *Ferebee vs. Chevron Oil Co.*, 736 F.2d 1529 (D.C. Cir. 1984), which had been endorsed under Washington's substantive law, *e.g. Intalco Aluminum v. Labor & Indus.*, 833 P.2d 390 (1992).[10]

G.E. advocated that *Daubert*, 509 U.S. 579 narrowed the admissibility.[11] In the discovery process, G.E. cited one article where two scientists reproached the medical community as to in medical care involving exposures to chemicals to beef up naming the chemicals.[12] The article was not a peer-reviewed, but rather

---

[8] Originally the trial was scheduled for approximately 30 trial days. It lasted 54 **long** trial days, because of daily renewed *Daubert* challenges.

[9] Carlson anticipated an proffer under *Daubert* to be as has been recognized in the *Hopkins v. Dow Corning Corp.*, 33 F.3d 116 (9th Cir.1994) and *Ambroosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) line of cases

[10] *Intalco* involved a toxic exposure in an Aluminum plant. *Intalco* addressed state law on burden of proof for causation. *Intalco* reviewed causation and the burden of proof specifically in refers to chemical insults. *Intalco* recognized physician, who used the differential diagnosis methodology in arriving at opinions on a more probable than not basis as to the cause of a patient-claimant's condition was sufficient causation proof. Most important to Carlson, *Intalco* found unnecessary for causation to prove which and how much of a particular chemical in a soup of chemicals caused the injury.

[11] G.E. viewed a *Daubert* challenge along the *Claar v. Burlington N. R.R.*, 29 F.3d 499, 504 (9th Cir.1994), and *Daubert v. Merrell-Dow*, 43 F.3d 1311 (9th Cir.1995), for clarity referred to as *Daubert II*.

[12] *"Organic Solvent Neurotoxicity: Facts and Research Needs*, Scand. J. Work. Environ. Health, 11, supp. 1:35-60 (1985). Dr. Goldstein identified out

was an editorial commentary.[13] G.E. latched on to a rhetorical portion of the article. From this article, G.E. argued vigorously throughout that *Daubert* stood for the proposition that peer-reviewed literature was absolutely necessary for expert testimony.

In the presence of two distinctly divergent positions on *Daubert* the district court mounted a valiant and patience effort to grapple with the matter. In the daily *Daubert* challenges, Carlson constantly distinguished on the matter of the moment between "admissibility" and "burden of proof for causation" under state law. On the other hand G.E. argued that it was purely admissibility under federal law. In retrospect, the "war" between the litigants cut to the heart of whether *Daubert*, was law of a preliminary Fed.R.Evid.Rule 104(a) analysis as to admissibility or an emergence of a federal common law, which Carlson opposes as being in derogation of the *Erie* Doctrine. After the *sua sponte* rulings of the district court, Carlson notes the foundational heart of *Daubert*, 509 U.S. 579, includes whether it is law of "admissibility" and not of "sufficiency" or is it both.

On this record and the questions presented Carlson request this Court's direction in resolving the ever increasing conflict between the courts of appeals on the meaning and

---

of context sentences were misleading. [200-201a]. In the 9 years since publication considerable scientific research published was published on solvents and injuries. [201a]. He identified where this editorial endorsed his methodology and supported his conclusions, that he reached from other "peer-reviewed" articles. [202-03-a]. Exhibits have not been reproduced herein.

[13] As a backdrop to the questions presented Carlson and scores of others were exposed to "numerous" hazardous chemicals and not just the two chemicals G.E. acknowledges.[183-192a, 206-207, 209, 216-18, 219-238] G.E. mixed these "numerous" hazardous chemicals up with other chemical products such as 409, Comet and Wiley's driveway cleaner. Records of the amounts of chemicals were kept, but no records of how the chemicals were mixed. G.E. took no air samples. Due to G.E. poor record keeping no one can honestly proffer an opinion as to the amounts and what other chemical were generated by all this mixing. It is simply known that hazardous chemicals at the Trentwood are known to react with other chemicals and it was dangerous.

application *Daubert v. Merrell Dow*, 507 U.S. 579. Leaving the matters that Carlson presents unanswered will only burden the system with injustice, confusion and expense in time and money.

II. Rules 49(a), 50 And 59 Are Being Improperly Defined By Conflicting Applications Of *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). The Conflict Results In An Altered Outcome In Derogation Of The *Erie* Doctrine.

Two divergent lines of cases have developed from this Court's decision in *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993). The conflict has increased with *Schudel v. General Elec.Co.*, 120 F.3rd 120 (9th Cir. 1997) decision. The conflict is primarily whether *Daubert* is a test for "admissibility" or also applicable post-verdict for determining the "sufficiency". In this debate a basic obvious inquiry has never been asked. The questions presented in Carlson[14] petition, now ask the obvious.[15]

The inquiry is: under diversity in a Rule 50(b) setting does federal or state law apply to determining "sufficiency" for a state-created claim? Logically, the procedure is Rules 50 and 59 diversity, but under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) state substantive law controls the testing of proof would post-judgment. State law is what defines the action, therefore state's substantive law defines each elements burden of proof. Carlson's petition illustrates what happens when the *Erie* Doctrine is shunted aside, and an adjudicated outcome set aside by federal

---

[14] Carlson notes that the other Plaintiffs, who petition separately for this Court review, have asked repeatedly the same question. Other plaintiffs as Carlson did constantly at trial, post-verdict and on appeal point out *Daubert* was a case of admissibility, and the substantive law to apply was that of Washington.

[15] Through out pre-trial, trial and on appeal, Carlson repeatedly advised the courts that there was a difference between admissibility and the burden of proof, and that state substantive law applied to the burden of proof, *e.g.*, [81, 89, 90-a]. When the trial court exceeded its authority Carlson repeatedly asserted that although the matters of the moment were of federal procedure, what the court was to do was to apply state substantive law to the procedure, *e.g.*, [107-110, 114, 141,145,146-148].

procedural law in lieu applying state substantive law for the claim.

Carlson is not advocated that in diversity *Daubert v. Merrell Dow*, 509 U.S. 579 stops directing the district court's procedural gatekeeper role vis-à-vis proffers of expert opinion testimony. However, on the admissibility of expert opinions on "causation for a state-related claim", there is a duality of procedure and substantive law involved. Under the case law this duality is treated consistently between the Circuits and panel. In diversity the district court uses federal law for procedure, but are required to apply state substantive law. *Gasperini v.Center for Humanities, Inc.*, 518 U.S ___, 116 S.Ct. 2211, 2219 (1996). When the court is determining causation sufficiency Carlson submits, there is no duality between federal procedure and state substantive law. The law demands that the court applies state law for sufficiency of causation proof for the state-based claim. See, *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Most recently, this Court addressed a confrontation between federal and state procedure in a post-trial context. *Gasperini*, 116 S.Ct. 2211. In resolving the question both this Court's majority and dissent addressed the implications of the *Erie* Doctrine in diversity matters involving both procedure and state substantive law. From *Gasperini*, Carlson is mindful of the due consideration to be given to *Guaranty Trust*'s, modification of the *Erie* Doctrine. The record and questions herein present a means for this Court to follow up on all facets of *Guaranty Trust's* reading of the "outcome-determination" test.

Carlson brings to this Court an opportunity to offer predictability to the daily circumstances of diversity and the Rules 49(a), 50(b) and 59. Under *Daubert*, 509 U.S. 579, the confusion and conflict surrounding expert causation proof have, and are, introducing chaos, when this Court's intent was to simplify. This petition provides an opportunity to address how the views of the *Erie* Doctrine as explored in *Gasperini*, and the clear federal procedure embodied in *Daubert v. Merrell Dow* can

be logically and rationally reconciled, as well as co-exist in the presence of a state-created claim and the attendant substantive law defining the burden of proof.

III Predictability Of The Factors Influencing The Admission Of Expert Opinions And The Later Test For Sufficiency Of Proof Facilitate The Purpose Of Rule 1.

Schudel's jurisdictional errors were probably made were because of confusion or conflict over what role *Daubert v. Merrell Dow*, 509 U.S. 579 plays at the different stages of a trial. Like the application of the *Erie* Doctrine, the answer to *Daubert's* use in diversity action is not mechanistic. This Court has opined: "We are confident that federal judges possess the capacity to undertake this review" [preliminary assessment an expert witnesses methodology]." *Daubert*, 482. Carlson observes there is a vast difference between having the intellectual acumen and actually knowing "how" to accomplish the task.

In this petition Carlson seeks to have this court clarify the conflict and assure appropriate consideration is given to state law. To his end Carlson summarizes that in diversity *Daubert* reasonably includes, *inter alia.*: (1) the gate keeper role is distinctly different from the post-verdict role under Rule 50(b) or 59; (2) that the focus of the admissibility inquiry is whether the underlying methodology is scientifically valid and properly applied to the facts of issue; (3) the focus is not on the conclusions but the methodology; (4) on the relevancy the proffer the court looks to state substantive law for the burden of proof for the "element"; (5) in any review of such matters as those suggested in *Daubert*, 509 U.S. at 483, the state substantive law for the burden of proof is a factor the court should, and perhaps must, consider; (6) with any admissibility inquiry due deference is given to state substantive law as to what is considered will eventually be applied for sufficient causation proof[16];(7)once a witness has passed the

---

[16] This area of inquiry has the greatest risk for alteration in outcome. Consider, sufficiency of causation proof under *Intalco Aluminum v. Labor &*

preliminary muster, the court's role as to the expert opinion's changes, *e.g.* it is the jury's province to weigh the creditability of the witness and the testimony; and (8) under Rule 50 and 59 the court's inquiry is different from that in determining admissibility.

Currently, how and what Carlson summarizes above is resolved in any individual case depends upon which case line the trial court adopts. This Court's intervention is needed to introduce stability into diversity litigation and to assure the risk of the outcome being different is reduced.

IV. If Rules 49(a) and 50 Are To Be Used Together There Are, And If Not, There Should Be Certain Ground Rules Enforced To Promote Just, Speedy, And Inexpensive Resolutions Of Disputes

We are a nation of law and not a nation of science. The citizen's legal problems are not going to be solved by science, but with the law. One might think, if a judge can master understanding the "methodology" and "scientific reliability" that is 90 percent of the task. The courts may reason that Rules of Evidence and Civil Procedure[17] are the answers. Yet, experience tells the truth is not being discovered in Rules[18]. For example the record that supports Carlson's petition herein.

Understanding what a "claim" is fundamental to a fair, and rational application of Rules 49(a), 50 and 59. There is a vast difference between a "legal" claim and a "scientific" claim. There is an absolute need for this Court to address the legal distinction between the two for purposes of testing competency.

Indus. 833 P.2d 390 (1992) and *McLaughlin v. Cooke*, 774 P.2d 1171(1989) verse what the *Schudel* courts' applied.

[17] Carlson is mindful of *Joiner vs. General Elec.Co.*, ___ U.S. ___, 118 S.Ct. 512 (1997), which provides some guidance. *Joiner* does not answer the questions Carlson poses herein.

[18] The federal bench is working very hard and diligently to address the complications of chemical litigation. Carlson submits, the difficulties are because too much emphasis is being placed on understanding the science and not enough on the law.

This petition brings to this Court's attention that the courts are either confused or in conflict over how, when and what to do in reference to scientific evidence when using and applying Rules 49(a), 50 and 59. Carlson submits, part of the legal problem is that no court is addressing that there are both "procedural" and " substantive" considerations attendant to legally managing scientific evidence.

The lack of consistency in what the courts do all the proffered scientific literature at best is unpredictable. There are problems of the court treating scientific literature in the same manner as legal authorities. It appears in many of the *Daubert* decisions, *Schudel* included, have overlooked an important philosophical difference between the study of law and the scientific studies. Carlson proposes that Justice. Steven's dissent in *Joiner*, is exactly on point with reality. *Joiner*, 118 S.Ct. at 522. The treatment of the scientific record here in *Schudel* is utterly appalling.[19] The legal system cannot be made perfect, but certainly a better job can be done than is being done as far as actual judicial review of the accompanying scientific literature.

If one assumes the study of law operates by deductive reasoning and sciences by inductive reasoning. When the district

---

[19] In *Schudel* the Ninth Circuit concluded Drs. Morton and Goldstein's extrapolations were not supported in science. This is very dangerous for a court to be making such statements about Federally Regulated Hazardous Chemicals. The court ought not encourage the violation of laws that are intended to protect workers and the community., *e.g.*, references [81-a]. The record herein is that many of the hazardous chemicals used at Trentwood, were by federal and state law to only be used with "self-contained respiratory" systems, *i.e.*, a ventilator with its own air supply. Mr. Carlson was given a PAPER MASK to protect his lungs. Carlson's exposure to caustic chemicals was not for minutes, it was for weeks. The exposures Carlson and the others endured were not low level exposures, where workers at least have the personal protective equipment that the law requires. If *Schudel* had looked at the three months of trial record, including G.E.'s own documents, there would have been no criticism of Drs. Morton's, Goldstein's, and Lantsberger's opinions.

court is considering the basis of an expert opinion is the court required to consider all the scientific material submitted in support of the witness's inductive analysis or does the court deduce from selected items whether the proof is scientifically sound. Is it improper for an appellate court in "deducing" whether a district court abused its discretion in admitting an expert opinion to select portions of the scientific offers of proof?[20]

In a Rule 50(b) and 59(d) related is what are courts do with defendants admissions pertinent to causation. For example, G.E. has an entire department that involved in the science, including the injuries caused by the chemicals used by G.E. Here the court either ignored or overlooked G.E.'s own scientific publications that stated the type of exposure Carlson had would injure him as it did, e.g., [78-80]. This is another example of why this Court needs to address the *Erie* Doctrine's application to scientific proof of causation. For in Carlson the test of sufficiency of causation proof would have reached a different outcome.[21]

---

[20] Here, the trial court post-judgment determined Dr. Lantsberger's testimony on Mr. Carlson's respiratory injury tainted the verdict. The only way that court's conclusion could be reached was by totally ignoring Dr. Lantsberger's proffer. Her proffer included chapters out of standard medical textbooks on covering the know respiratory injuries associated with the chemicals that Carlson was exposed. [224 ¶16, 17; 228-229, 234, 235 ¶91]. There were hundred's of peer-reviewed scientific articles contained in the chapters. The court had to ignore her more-probable than not testimony based on all her clinical evaluations and treatments over five years. The most outrageous is that the court had to have totally ignored Dr. Milhem's independent peer-reviewed scientific article on this very poisoning. [183-192a, 205-218a] as well as hi s testimony. The trial court had to ignore all the lay testimony, including Carlson at age 23 before the poisoning was capable of engaging in all the physical activities of athletic young man, then after the poisoning he was lucky to walk a few blocks without significant shortness of breath. On appeal the Ninth Circuit looked at absolutely nothing of Carlson's proof, but concluded the trial court's ruling was appropriate. As far as procedure in for Rules 50 or 59 this is appalling lack of justice.

[21] For example, McLaughlin v. Cooke, Supra; Bitzan v. Parisi, 558

V. When There Is Bonafide Record That The District Court Exceeded Its Authority It Is Unacceptable For The Appellate Court To Avoid Or Abdicate Addressing The Jurisdictional Challenge.

Through out this petition Carlson has described and discussed the trial court's lack of jurisdiction. During the pendency of the matter several Ninth Circuit decisions construing *Daubert* were rendered. Pre-trial the court determined that the treating physicians use of the differential diagnosis process was a reliable "methodology" and that the expert's opinions had a generally acceptable scientific basis. Then post-judgment the court took completely different approach. Inherent to *sua sponte* motions with no hearings there is no opportunity for the litigants to carry on the discourse expected between the bar and bench.

134 days after a judgment was entered in favor of Carlson the district court *sua sponte* dismissed under Rule 50(b) portion of Carlson's case relating only to an "issue", set aside Carlson's judgment and ordered a new trial. In so ruling the court provided its first notice to Carlson of the court's *sua sponte* motion.[22] In making the *sua sponte* post-judgment motion the court improperly used *Daubert*. The district court did not apply controlling state law on the burden of proof for "causation in a negligence claim." This squarely brings to issue the *Erie* Doctrine. 28 U.S.C. § 2072(b) as well as other well settled federal law.

The ruling *sua sponte* 134 days post-judgment lacked jurisdiction in numerous respects. First, the court gave no notice and an opportunity to be heard on the court's own motions. See

---

(1981) and Reese vs. Strohl, 907 P.2d 282 (1996).

[22] As to Carlson G.E. had timely made a Rule 50(b) motion for a JNOV on the negligence "claim". There was no Rule 50(b) motion made in the alternative for a new trial or for a judgment as a matter of law (JOML) on any "issue". Likewise, G.E. timely made a Rule 59(b) for a new trial or an alternative Rule 59 relief. The district court ultimately and specifically denied G.E.'s Rule 59 motion.

Fed. R. Iv. P. 59. Next, the court *sua sponte* resurrected sub-issues that both parties and the court had earlier waived under Rule 49(a). On its own motion, the court granted a JOML either under Rule 50(b) or 59(d) a new trial on damages for determination of resurrected previously waived sub-issues. In granting the MOL the court either created new "legal" claims—neurological claim verse non-neurological claim—or made a grievous error in confusing a "legal" claim, *e.g.*, with a "claim" perhaps made in science.

The district court engaged in uses and applications of Rules 49(a), 50(b) and 59(d) that were a gross distortion of the Rules of Civil Procedure. Carlson believes the court was either confused or in conflict, because what was clearly lacked authority.

VI. Failing To Accept A Jurisdictional Challenge The Court of Appeals Sanctioned The Unacceptable And Extremely Usual Proceedings Under The Law And The Civil Rules Of Procedure.

134 days post-judgment a party cannot move under either Rule 50(b) or 59, much less request a new trial on issues waived under Rule 49(a).[23] Avoiding Carlson's jurisdictional challenge, the Ninth Circuit sanctioned what a party may not do. The *Schudel*'s action conflicts with *Peterman v. Chicago, Rock Island & Pacific RR Co.*, 493 F.2d 88(8th Cir), *cert. denied*, 417 U.S. 947 (1974). In a post-trial motion setting, occurring more than 10 days after judgment, the trial court moved and granted its own motion for a new trial. *Peterman* remanded for reinstatement of the judgment. *Peterman* considered it a Rule 59(d) motion. Here, the Ninth Circuit ruled this district court's *sua sponte* ruling was under Rule 50(b).[24] *Schudel*, 120 F.3d at 995.

---

[23] Rule 49(a) clearly warns the parties and the court, that if the court . . . omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted, unless before the jury was dismissed the party demands its submission to the jury.

[24] Rule 50(b) does not permit the court to initiate its own motion. It is

Schudel refused to acknowledge the prior Ninth Circuit law on the issue finality of a Rule 49(a). Citing this Court, *Floyd v. Laws*, 929 F.2d 1390 (9th Cir.1991), reinforced the court's duty to reconcile and harmonize the special verdict findings. Treating each finding as correct and consistent, the court simply can not choose to ignore each supported Rule 49(a) finding.[25] Picking up on the theory of "neurological and non-neurological" claims, *Schudel*, 120 F.3d at 994, side stepped that Rule 50(b) and 49(a) were intended to work together.[26]

Under this record *Schudel* presents three important matters as to Rules 49(a), 50(b) and 59(d). The matters are related and are: (1) if Rules 49(a) and 50(b) are intended to be used together, is the scope of Rule 50(b) limited by Rule 49(a); (2) is the scope of Rule 59(d) language that a new trial may be granted "for any reason for which it might have granted a new trial on motion of a party"[27] tempered by Rule 49(a); and (3) are there any *Erie* Doctrine proscripts attendant to the application of *Daubert v. Merrell-Dow*, 509 U.S. 579,113 S.Ct. 2786 (1993) with a special verdict in Rule 50(b) and 59(d) settings.

VI. The Ninth Circuit's Endorsement Of The Trial Court's Rulings Improperly Abrogates Rule 49(a).

When presented with the appeal the Ninth Circuit's first inquiry is jurisdiction. The appeal was from lack of jurisdiction. The *Schudel* Court's actions conflict with well

---

illogical that *Schudel* treats the district court's ruling as a Rule 50(b).

[25] *Gallick v. Baltimore & Ohio, R.Co.*, 372 U.S. 108 (1963)

[26] The 1991 Amendment of Rule 50(b) was intended so that it could be used with Rule 49(a). Working together, Rules 50(b) and 49(a) permit the parties to set whether a jury resolves specific or limited factual disputes. Using the Rules together allows the litigants latitude to set the simplicity or complexity of their particular dispute.

[27] The language in the 1995 version of Rule 59(d) is slightly different. The important matter raised, is the same under either version. Further, Carlson adopts as his all other *Schudel* plaintiffs-petitioners Writ of Certiorari as it relates to the retroactive application of Rule 59(d).

settled law. *Eaton v. Nat'l Steel Production Co.*,624 F.2d 863 (9th Cir. 1980). The Ninth Circuit overlooked the basic that jury verdicts are due considerable deference.[28] The record presented was that the district court was using the Rules of Civil Procedure that stripped the court of jurisdiction. It simply is unfair that Ninth Circuit focused on Rule 54(b), when Carlson was raising the lack of jurisdiction under Rules 49(a), 50(b) and 59(d). The *Schudel* court made the same error as the trial court in actually appropriately applying the applicable state law to the matter.[29]

Looking at current Washington law in cases involving chemicals and sufficiency of proof it was obvious the trial court's reasoning on "neurological and non-neurological" claims was not only illogical, e.g. Fed. R. Civ. P. 8(a), but on given the substantive law and causation it violated the *Erie* Doctrine. The outcome determinative implications of the trial court's post-trial ruling was glaringly apparent. For example in with the *Reese* Court referenced *Intalco Aluminum v. Labor & Indus.*, 833 P.2d 390 (1992). The physicians of *Intalco* employed the same methodology. Noting Dr. Rosenstock the *Intalco* observed at 833 P.2d at 399:

> [T]here are many examples in occupational medicine where an association between a patient's work conditions and disease has gone unnoticed for years, often because the patient's illness has been misdiagnosed. If this court were to accept Intalco's argument, the first victims of any newly recognized

---

[28] Kern v. Levelor Lorentzen, Inc., 899 F.2d 772, 775, (9th Cir. 1990). Eastman Kodak Company v. Southern Photo Materials Company, 273 U.S. 359, 71 L.Ed. 684, 47 S.Ct. 400 (1927).

[29] The *Schudel* Court looked to a 1966 medical malpractice case on that discussed a small portion of Washington law on causation. It makes no sense for the *Schudel* Court to not look at the more current law of *Intalco Aluminum, Supra; McLaughlin v. Cooke; Supra.; Bitzan v. Parisi; and Sofie v. Fiberboard, Supra*, given the jurisdictional challenge and what Carlson pointed out to the court.

occupational disease be denied benefits simply because Drs. Longstreth and Rosenstock were the first physicians to systematically study the effects of pot room toxic exposures on the central nervous system of humans.

On the state substantive law Carlson's proof through Drs. Lantsberger, Goldstein and Milhem was in keeping with *Italco Aluminum*, 833 P.2d 400. In diversity the district court obviously lacked authority to apply federal procedural law in lieu of controlling state law in testing the sufficiency of the proof for causation. See also *McLaughlin v. Cooke*, 774 P.2d at 1175; *Bennett v. Dept. of L&I*, 95 Wn.2d 531, 627 P.2d 104 (1981)

A natural question is whether post-trial does a consistent Rule 49(a) verdict, in any manner constrain post-trial rulings. First, Carlson observes, if Rule 49(a) is not used with either or both Rules 50(b) and 59(b), then there is no point in Rule 49(a).

When Rule 49(a) is treated as disjunctive of Rules 50(b) and 59(d) the well settled law that "we will uphold the verdict if the evidence is sufficient with respect to any of the allegations." *McCord v. McGuire*, 873 F.2d 1271, 1274, amended 885 F.2d 650 (9th Cir.1989) citing, *Lavender v. Kern*, 327 U.S. 645 (1946). Here, the post-trial ruling was justified by suggesting that Carlson had not cooperated with drafting the Rule 49(a) form. Contrarily, see [88-90a]. Under the law the court had the power to overrule Carlson's objected to the court's proposal. When Rule 49(a) is read with Rules 50 and 59, the court is equally bound to the principle that " litigants [courts] have the responsibility to request or submit special verdict forms. *McCord*, 650 F.2d 650.

Schudel thwarts the intent that a special verdict is "to identify the basis for the jury's verdict, and thus avoid confusion, appellate uncertainty, and the need for additional proceedings." *Simms v. Village of Albion, N.Y.* 115 F.3d 1098, 1105 (1997). Sanctioning a disjunctive use of Rule 49(a), 50(b), and 59 *Schudel* contravenes a "just, speedy, and inexpensive trial Fed.R.Civ.P. 1.

Schudel's permitting the use of Rule 50(b), and implicitly 59(d), to resurrection waived Rule 49(a), is like extending a Statute of Limitations beyond its lawful expiration. Like jurisdictional limits set by the time limits of post-trial motions, Rule 49(a) sets a point in litigation when the number and extent of issues to be decided by jury is definite. See by analogy, *Browder v. Dept. of Corrections*, 434 U.S. 257, 264 (1978). Likewise, setting a point beyond which the court, on its own, may not submit additional issues to a jury is an important right for any party. In submitting this matter, Carlson suggest the *Schudel* courts us of either Rule 50(b) or 59(d) to the disregard of Rule 49(a) is prohibited by 28 U.S.C. § 2072(b).

It is a parties substantive right that "the first" jury's special findings are to be harmonized in a manner to make the verdict consistent. *A&G Stevedores v. Ellerman Lines*, 369 U.S. 355, 365(1962).[30] On this matter, it is pertinent that the Seventh Amendment is viewed as a means to "control the allocation of authority to review verdicts." *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. at 2214. If the scope rules of procedure are viewed to avoid "direct collision" with state law, but still giving its plain meaning,[31] what is the extent that the court may rule under Rule 50(b) or 59(d) on Rule 49(a) waived issues?

On the above, in diversity it is an important matter whether *Schudel's* sanctioning a trial court's post-judgment ruling to have a second jury segregate damages according to body parts violates the *Erie* Doctrine, 28 U.S.C. §2072 or both. For example in Washington damages are the provinces of the jury, meaning the verdict need not be broken down and attributed piece by piece to a particular injury.[32] The outcome would be altered in state court.

---

[30] If a second special verdict cannot be harmonized, is there a third trial?

[31] *Walker v. Armco Steel Corp.*, 446 U.S. 738, 751 (1980) addressing the rationale of the *Erie* Doctrine.

[32] Washington law is unequivocal. The jury has the ultimate power to

CONCLUSION

Justice was not done for Merlin E. Carlson, Jr. Had his case been tried in state court, where he started it, the matter would be long over. Instead it is nine and half years since he was poisoned. The justice he is due, has been delayed because of confusion and conflict in the federal court system. The matters that Carlson raises are probably not unique to him given the conflict in Circuits and within the Ninth Circuit Court of Appeals.

Carlson has identified several basic inquiries as to federal procedure. Perhaps it can be said that when there is an area as the contentionous of chemical litigation and expert opinions on causation, it has the ability to tease out other problems just below the surface. The questions Carlson raises in his jurisdictional challenge concerning the use and application of Rules 49(a), 50(b) and 59(d) are potentially not unique to chemical litigation. Given this Court's direction to litigants and the district courts in Fed. R. Civ. P. 1, addressing how Rules 49(a), 50(b) and 59(d) are to work together will benefit all.

The problems with confusion and conflict over whether *Daubert v. Merrell Dow*, 509 U.S. 579, is about "admissibility" or "sufficiency" of the evidence must be addressed. It is too expensive in time and money for both litigants and the courts to wait. Answering the basic inquiry of when and how state substantive law is applied in matters of "causation" proof will increase the odds that the confusion and conflict will be reduced. Given the magnitude of chemicals in the community and work place, the courts' task of dealing with expert testimony is not going to stop. Have a clear statement of what is a matter of law and what is a matter of science will help.

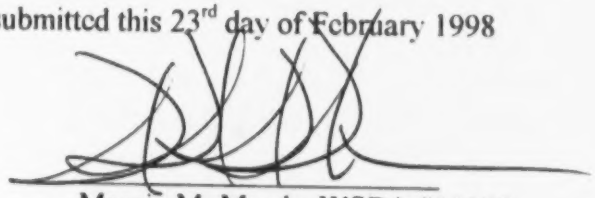
Along with these important matters of federal questions this Court should exercise its supervisory authority to insure that

---

determine damages, including the amount, *Sofie v. Fibreboard Corp.*, 771 P.2d 771, 716-17(1989) reviewing and affirming well settled state damage law. Prohibiting first time request for segregation of damages. *Wheeler v. Catholic Archdiocese*, 880 P 2d 29, 33 (1994).

the district court is corrected in exceeding its authority under the then existing rules and case law. For reasons set forth above, Petitioner Carlson respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted this 23rd day of February 1998



Marcia M. Meade, WSBA #11122
Attorney for Petitioner
Merlin E. Carlson, Jr.